

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 29, 2006

**COREY DOUGLAS KUCLO v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Montgomery County**  
**No. 40300291     John H. Gasaway, III, Judge**

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**No. M2006-00356-CCA-R3-PC - Filed December 21, 2006**

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The petitioner, Corey Douglas Kuclo, appeals the dismissal of his petition for post-conviction relief, arguing that his trial counsel was ineffective for failing to file a motion to suppress and by not conducting an adequate investigation. Following our review, we affirm the post-conviction court's dismissal of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Jeffrey S. Grimes, Clarksville, Tennessee, for the appellant, Corey Douglas Kuclo.

Michael E. Moore, Acting Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and A. Danielle Ashby, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

In a twelve-count indictment, the petitioner was indicted for three counts of aggravated burglary, three counts of theft under \$10,000, one count of burglary other than a habitation, one count of theft under \$1000, one count of theft under \$500, one count of attempted aggravated burglary, and two counts of vandalism up to \$500. On January 15, 2004, he pled guilty to four counts of burglary, a Class D felony, in exchange for an effective six-year sentence in the Department of Correction, and the remaining counts were dismissed.

On April 5, 2005, the petitioner filed a *pro se* petition for post-conviction relief and, after the appointment of counsel, filed two amended petitions on October 28, 2005, and November 2, 2005.

In his petitions, he alleged that he received the ineffective assistance of trial counsel who should have, in his view, more fully investigated the case and filed a motion to suppress.

At the January 12, 2006, evidentiary hearing, Deputy Robert Oliver of the Montgomery County Sheriff's Department testified about the events that led to the petitioner's arrest. Deputy Oliver stated that while on patrol on March 6, 2003, he followed a car containing a male driver and two male passengers because he recognized the man in the backseat as a known drug user. He said that although the driver had not committed a traffic offense, he turned on his lights and pulled in behind the car when it stopped in a residential driveway. After confirming that none of the men had outstanding local warrants, Deputy Oliver asked the petitioner, who had been driving, for permission to search the car. The petitioner did not consent until after Deputy Oliver called the sergeant in charge of the K-9 unit. In the car, Deputy Oliver found several items, including a chainsaw, a television, and a safe, that were confiscated by an investigator and later discovered to be stolen property.

The petitioner's trial counsel testified that he did not file a motion to suppress the evidence recovered as a result of the stop, but conducted settlement negotiations on the assumption that such a motion would have been granted. He explained that the petitioner's two codefendants had given statements and would have testified against him had he gone to trial, which was the "biggest problem" facing the petitioner. He said that he thought it was likely the petitioner would have been convicted based upon the codefendants' testimony and that he could have received consecutive sentences on numerous convictions. Trial counsel also confirmed that the decision to recommend the plea agreement was a strategic one.

The petitioner testified that he had been in custody since his arrest, that trial counsel never met with him at the jail, and that he had written counsel several letters requesting him to file pretrial motions, including a motion to suppress the evidence. He said that on the day he pled guilty, trial counsel told him that if he did not accept the plea agreement, "they were going to hang" him, that motions had been filed but had not been heard, and that because "it didn't look good," he "better take the deal." On cross-examination, the petitioner acknowledged that he had prior convictions for aggravated burglary and that trial counsel had told him a codefendant was prepared to testify against him.

At the close of the hearing, the post-conviction court found that had the petitioner gone to trial and been unsuccessful, he could have been sentenced to as little as two or as many as seventy-four years. The court also concluded that the plea agreement "worked out" by trial counsel was consistent with his testimony that he negotiated as though a motion to suppress would have been successful. The court noted that the petitioner had failed to show there was no other evidence to corroborate the testimony of his codefendants and found that

even if the suppression motion had been filed and even if it had been successful, the [p]etitioner has not met his burden here today of convincing the [c]ourt that [trial

counsel's] services were below the standard required by law; moreover, that there would have been any difference to his advantage had he gone to trial on these.

In its order dismissing the post-conviction petition, the court additionally found that the “6-year sentence was a favorable offer” for the petitioner and that the allegations in his petitions were without merit.

## **ANALYSIS**

### **I. Post-Conviction Standard of Review**

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the post-conviction court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review is of purely factual issues, the appellate court should not re-weigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

### **II. Ineffective Assistance of Counsel**

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 Ct. 2052 (1984); see also State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that “counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a “probability sufficient to undermine confidence in the outcome,” that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In the case of a guilty plea, “a petitioner who is seeking to establish that a deficiency resulted in prejudice must demonstrate ‘that there is a reasonable probability that, but for counsel’s error, he would not have pleaded guilty and would have insisted on going to trial.’” Howell v. State, 185 S.W.3d 319, 329 (Tenn. 2006) (quoting House v. State, 44 S.W.3d 508, 516 (Tenn. 2001)) (citing Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)) (internal quotations omitted).

On appeal, the petitioner argues that “trial counsel rendered ineffective assistance of counsel, in violation of the [Sixth] Amendment [to] the [United States] Constitution and/or Art. I § 9 of the Tennessee Constitution by not fully and adequately investigating [petitioner’s] case prior to allowing [petitioner] to plead guilty.” Specifically, he asserts that trial counsel’s performance was deficient for failure to investigate the petitioner’s requested suppression motion and for not sufficiently explaining “what was going on in the case to” him. Additionally, he contends that were it not for these deficiencies, he would not have pled guilty.

The post-conviction court found both that the petitioner failed to show either that trial counsel was ineffective or that the petitioner was prejudiced by counsel’s alleged deficiencies. Counsel said that he considered filing a motion to suppress and negotiated a settlement as if such a motion would be granted. However, the main problem for the petitioner was that his codefendants had agreed to testify against him, and he failed to show that there was no corroboration of their testimony as to his involvement. The record supports these determinations by the post-conviction court and, accordingly, we conclude that it supports the dismissal of the petition.

### **CONCLUSION**

\_\_\_\_Based on the foregoing reasoning and authorities, we affirm the post-conviction court’s dismissal of the petition.

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ALAN E. GLENN, JUDGE